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No. 125

In the Supreme Court of the United States

OCTOBER TERM, 1930

WALTER E. CARR, DIRECTOR OF IMMIGRATION OF THE UNITED STATES FOR THE LOS ANGELES DISTRICT, No. 31, PETITIONER

v.

MATEO ZAJA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 125

WALTER E. CARR, DIRECTOR GENERAL OF IMMIGRATION of the United States for the Los Angeles District, No. 31, petitioner

v.

MATEO ZAJA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

Since the Government filed its briefs in this case and in Nos. 92 and 336, which present the same points, the respondent has filed its brief. As certain contentions made in it are not considered in the Government's briefs, we reply to them herein.

I

Respondent's brief (p. 8) quotes the following provision of Rule 6, subdivision I, paragraph 1, of the Immigration Rules of July 1, 1925:

> Any alien who shall come to a United States port as a seaman and land in the

> United States otherwise than in pursuance of and in accordance with the provisions of the act of February 5, 1917, shall be arrested, as provided in section 34 of said act, whenever and wherever found in this country within three years from the date of landing.

And respondent's brief then states:

> It is, therefore, apparent that the Secretary of Labor in 1925 recognized that regulations affecting alien seamen, promulgated pursuant to the authority conferred upon him by the provisions of the Immigration Act of 1924, were, nevertheless, limited by the provisions of Section 34 of the Act of 1917, and that this Section was not repealed by the Act of 1924.

It is true that Section 34 of the Act of 1917 was not repealed by the Act of 1924, and the part of Rule 6 quoted by the respondent is applicable to proceedings brought under Section 34 of that Act. But the rest of the above assertion is unfounded. Paragraphs 2 and 3 of the same Rule (printed on pp. 24–25 of the petitioner's brief) show clearly that the limitations of Section 34 are not applied by the Department of Labor to proceedings to deport alien seamen for remaining for more than sixty days after entry. In view of these provisions, it is obvious that the first paragraph of this Rule was not meant to apply to such proceedings, although the language of the first sentence of that paragraph, standing by itself, might be susceptible of that construction. Paragraph 2 of this Rule ex-

pressly states that if the seaman remains for more than sixty days after entry he "shall be taken into custody and deported at any time thereafter in accordance with the provisions of section 14" of the Act of 1924. And paragraph 3 of the Rule provides that if the warrant is based on some charge other than entering contrary to the provisions of Section 34 of the Act of February 5, 1917, "the conduct of the hearing shall be governed by subdivision D of rule 18." Subdivision D of Rule 18 provides for a hearing by an examining inspector, whereas Section 34 of the Act of 1917 requires that the alien be brought before a board of special inquiry for examination as to the alien's qualifications for admission.

Although the language of the first sentence of paragraph 1, quoted above, is not very felicitous, it is obvious, in the light of the explicit provisions of paragraphs 2 and 3 of the Rule, that this sentence should be construed as if it read:

> Any alien who shall come to a United States port as a seaman and land in the United States in violation of some provision of the act of February 5, 1917, shall be arrested as provided in section 34 of said act whenever and wherever found in this country within three years from the date of landing, if the proceeding for deportation is based on the violation of a provision of said act.

The practice of the Department of Labor has construed the language in this limited manner.

II

Part of the argument of the respondent seems to be based upon the contention that he entered the United States surreptitiously and that he can be deported only in accordance with the provision of Section 34 of the Act of 1917.

As we have suggested in our original brief, the alien can not be better off if his conduct constituted a violation both of Section 34 of the 1917 Act and of the regulations promulgated under Section 14 of the 1924 Act than he would be if he had violated the regulations only.

In any event, the respondent is not in a position to raise this point. If a violation of the provisions of the 1917 Act would benefit him, he must show that he did violate them. Although this particular situation is not expressly mentioned in Section 23[1] of the Act of 1924, which deals with the burden of proof, the principle underlying it would be contravened by compelling the Government to prove that the alien did not enter in violation of the 1917 Act in order to deport him under the 1924 Act.

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[1] This section provides: "Whenever any alien attempts to enter the United States the burden of proof shall be upon such alien to establish that he is not subject to exclusion under any provision of the immigration laws; and in any deportation proceeding against any alien the burden of proof shall be upon such alien to show that he entered the United States lawfully, and the time, place, and manner of such entry into the United States, but in presenting such proof he shall be entitled to the production of his immigration visa, if any, or of other documents concerning such entry, in the custody of the Department of Labor."

There is no allegation in the petition for *habeas corpus* that the alien entered in violation of the provisions of the 1924 Act, and the ground for deportation asserted in the warrant of arrest and the warrant of deportation is merely that the alien remained in the United States for a longer time than permitted under the Act of 1924 and the regulations made thereunder. This was the only fact found by the Immigrant Inspector after the hearing.[2]

Although the testimony is not very clear, we submit that a reasonable interpretation of it is consistent only with the theory that the immigrant entered lawfully. Thus, in the investigation of October 4, 1928, which was made by Inspector in Charge Gatley before the alien was arrested, the alien stated that when he got the job on the S. S. *Livenza* he did not intend to leave the ship in the United States; and he testified that when the *Livenza* arrived in the United States "we were lined up on deck and two men walked by us," and that "they took two men away with them." (Evidently they were immigration officials and evidently

[2] The warrant and the transcript of the hearing before the Immigrant Inspector, as well as certain other documents and proceedings referred to hereafter, do not appear in the printed record filed in this Court. But all of these are in the record of the Bureau of Immigration which is filed with the Clerk of this Court and which is part of the record in this case. (See R. 12–13.)

they passed the respondent.) In the same hearing he testified that the captain did not pay him off.

In the hearing before Inspector Thur on October 22, 1928, at which the respondent was represented by counsel, he said that all of the evidence which he had given before Inspector Gatley was true. At this hearing the alien testified that when he left the ship in San Pedro his intention was to change to another ship; that when he had stayed here a while he got a job working in ditches, and that his intention to stay in the United States occurred after he got work ashore.

Moreover, the alien denied that he had been arrested since entry or that he had certain diseases about which he was asked. These questions and answers, so far as they go, indicate that he had done nothing which would be a ground for deportation under the 1917 Act.

III

The respondent's brief also argues that the cause has become moot, inasmuch as no application for a stay of mandate was made and the mandate of the Circuit Court of Appeals was sent to the District Court and was spread upon the minutes of that court. It does not appear that the District Court took any further action and we are informed by telegram from the clerk of that court that nothing has been done by that court since the mandate was spread upon the minutes.

When the writ of *habeas corpus* was issued a bond was filed in the District Court,[3] one of the conditions of which is that the alien shall—

> abide all the orders, judgments and decrees of said court and not depart the said court without leave until the habeas corpus proceedings shall have been fully disposed of and shall surrender himself to Walter E. Carr, District Director of District Number 31, Immigration Service of the United States of America, in the event said writ of habeas corpus shall be discharged and said Mateo Zaja be remanded to the custody of the immigration officials * * *

This bond has not been canceled or the bail released, and we submit that it remains in force and that the above condition will be broken if this Court reverses the decree of the District Court and the alien is not then surrendered to the proper immigration officials.

Regardless of what has been done, it is clear that the issuance of the mandate and the steps taken subsequent thereto are ineffective to deprive this Court of jurisdiction to review and correct the decrees of the courts below. *The Conqueror,* 166 U. S. 110, 113. See also *Magnum Co.* v. *Coty,* 262 U. S. 159; *Thomsen* v. *Cayser,* 243 U. S. 66, 83;

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[3] The only mention of this in the record is in the order of the District Court commanding the writ to issue, in which appears this statement: "pending hearing thereon petitioner to be released on $500 bond." The clerk of the District Court informs us by telegram that bond was given and that it contains the condition quoted above.

Ritter v. *Mutual Life Ins. Co.*, 72 Fed. 567 (C. C. A. 3d), 169 U. S. 139; *Louisville &c. Railroad* v. *Behlmer*, 169 U. S. 644, 648; Rule 45 of the Supreme Court.

IV

United States ex. rel. Anastasios Cateches v. Day (C. C. A. 2d), referred to on pages 12–13 of our original brief in the instant case as "not yet reported" is now reported in 45 F. (2d) 142.

Respectfully submitted.

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